IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.335 OF 1988

Kisan Savala Rajpure ...Appellant

Vs.

Anand Laxman Rajpure ...Respondent

Mr.V.A.Thorat for the Appellant.

CORAM: A.S.OKA, J.
DATED: JANUARY 14, 2005.

ORAL JUDGMENT :

1. Heard Shri Thorat for the Appellant. Office noting shows that the Respondent is served. Appeal was admitted on 6th October 1988 by observing substantial questions of law are raised in ground Nos.(b), (c) and (d). The said grounds read thus :

(b) Whether the failure of the Plaintiff to prove payment of small part of the consideration of Rs.300/- out of agreed purchase price of Rs.3,000/- amounts to his unwillingness to perform his part of contract.

(c) Whether the Exhibit 59, a pursis filed by the Plaintiff, the Plaintiff specifically asserted his willingness to pay balance purchase price of Rs.500/- is sufficient for showing his

willingness to perform his part of the contract.

(d) Whether the Plaintiff can be refused specific performance of an agreement only on the ground that his assertion of payment of Rs.300/- is held not to be proved.

2. The Appeal is by unsuccessful Plaintiff in a suit for specific performance. The case of the Appellant-Plaintiff is that the Respondent agreed to sell suit land to him for consideration of Rs.3000/- and accordingly an agreement for sale dated 6th June 1974 (hereinafter referred to as the suit Agreement) was executed. The case of the Appellant is that prior to the execution of the suit agreement he had paid a sum of Rs.1000/- to the Respondent and no writing was executed at the time of payment of the said amount. His case is that on execution of the suit agreement a further sum of Rs.1500/- was paid by him to the Respondent. It was agreed by the Respondent to execute the sale deed after obtaining necessary permission from the Collector. The case of the Appellant is that subsequent to the execution of the agreement, he paid a further sum of Rs.300/- to the Respondent. It is the case of the Appellant that on 5th December 1975, the Respondent made an application to the Competent Authority for grant of sale permission. However, the Respondent himself raised an objection to the said application and therefore permission was not granted in his

favour. The Appellant on 30th November 1976 called upon the Respondent to execute the sale deed. However, the Respondent declined to do so by sending reply dated 14th December 1976. Therefore, the Appellant issued notice dated 5th January 1977 to the Respondent calling upon him to obtain sale permission and to execute the sale deed. As the Respondent declined to comply with the said notice, the suit for specific performance was filed. A prayer was made by the Appellant in the alternative for refund of a sum of Rs.2800/-.

3. The suit was contested by the Respondent by filing written statement. The case of the Respondent is that in the year 1974 he was in need of financial assistance and taking undue advantage of his need and illiteracy, the Appellant got executed the suit agreement by paying a sum of Rs.1500/-. The Respondent stated that he was deceived by the Appellant by obtaining of the suit agreement. He also denied of having received a sum of Rs.300/- after the execution of the suit agreement. He admitted that subsequently he handed over the possession of the suit property to the Appellant.

4. The learned Trial Judge decreed the suit. The learned Trial Judge, however, disbelieved the case of the Appellant that he had paid a sum of Rs.300/- after execution of the suit agreement.

5. An Appeal was preferred by the Respondent to the District

Court. By the impugned Judgment and Decree, the Appeal was allowed and Decree for specific performance was set aside. The Appellate Court substituted the decree of the Trial Court by directing the Respondent to pay a sum of Rs.2500/- with proportionate costs of the suit to the Appellant. The Appellate Court held that the very fact that the Trial Court recorded the finding that the Appellant has failed to prove the payment of Rs.300/- after execution of the suit agreement shows that the Appellant was not ready and willing to comply with the suit agreement. The Appellate Court held that the Appellant ought to have established his readiness and willingness to pay the balance amount of Rs.500/- and the readiness and willingness which was established was to pay a sum of Rs.200/- only. It cannot be said that the Appellant has complied with the requirement of Section 16 (c) of Specific Relief Act, 1963 (hereinafter referred to as said Act of 1963). On this ground, the decree of the Trial Court has been set aside. However, the Appellate Court accepted the case of the Appellant that the suit agreement was executed by the Respondent and total sum of Rs.2500/- was paid by the Appellant to the Respondent out of agreed consideration of Rs.3000/-.

6. Shri Thorat, learned Counsel for the Appellant relying upon the Judgment of the Apex Court reported in A.I.R. 2000 SC page No.2408 (Motilal Jain Vs.Smt.Ramdasi Devi and others) contended that if the Appellant had paid a sum of Rs.2500/-

out of the agreed consideration of Rs.3000/-, there was no reason why he would not pay the balance amount of Rs.500/-. He also relied upon another Judgment of the Apex Court reported in A.I.R.2000 S.C.page 860. He relied upon the pursis filed by the Appellant in the Trial Court at Exh.59. He pointed out that in the said pursis the Appellant has expressed willingness to pay a sum of Rs.500/- to the Respondent in the event his case of payment of Rs.300/- was not accepted by the Court. He submitted that there was no reason for the Appellant to avoid the payment of Rs.500/-. He submitted that the finding recorded by the Appellate Court on the issue of readiness and willingness was perverse which needs interference in the Second Appeal.

7. I have considered the submissions of Shri Thorat. In so far as execution of the suit agreement is concerned, there is a concurrent finding recorded by the Courts below in favour of the Appellant. The Courts below have also accepted the case of the Appellant that out of total consideration of Rs.3000/- agreed to be paid by the Appellant, a sum of Rs.2500/- was paid to the Respondent. The only fault found by the Appellate Court with the conduct of the Appellant is that in the plaint he alleged that further sum of Rs.300/- was paid by him after execution of the suit agreement and he has failed to prove the said payment. As readiness to pay entire remaining consideration sum of Rs.500/- was not established, specific performance was denied to the

Appellant.

8. In this behalf, it will be necessary to refer to the ratio of the Judgment of the Apex Court in case of Motilal Jain (supra). Paragraph Nos. 9 and 10 of the Judgment of the Apex Court read thus :

> "9. That decision was relied upon by a three Judges Bench of this Court in Syed Dastagir's case (1999) AIR SCW 2959: AIR 1999 SC 3029) (supra), wherein it was held that in construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. It is pointed out that in India most of the pleas are drafted by counsel and hence they inevitably differ from one to the other; thus, to gather true spirit behind a plea it should be read as a whole and to test whether the plaintiff has performed his obligations, one has to see the pith and substance of the plea. It was observed, "Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) of the Specific Relief Act,s 1963 does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract." So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form." **It is thus clear that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract which is subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and**

willingness of the plaintiff in a suit of specific performance of contract for sale.

10. In the instant case a perusal of paras 6 to 11 of the plaint do clearly indicate the readiness and willingness of the plaintiff. The only obligation which he had to comply with was payment of balance of consideration. It was stated that he demanded the defendant to receive the balance of consideration of Rs.8000/- and execute the sale deed. The defendant was in Patna (Bihar) at the time of notices and when he came back to his place the plaintiff filed the suit against him. In support of his case, he adduce the evidence of P.W 1 and PW 2. **The plaintiff had parted with two-third of the consideration at the time of execution of Exh.2. There is no reason why he would not pay the balance of one-third consideration of Rs.8000/- to have the property conveyed in his favour."**

(Emphasis supplied)

It to be noted here that the Appellate Court has not found fault with the pleadings of the Appellant. The Appellate Court overturned the Decree of the Trial Court only because of the failure of the Appellant to establish the payment of Rs.500/-. It is also necessary to refer to the law laid down by the Apex Court in a Judgment reported in 2003 (10) S.C.C. page No.390 (Manjunath Anandappa Vs. Tammanasa & Ors.) and in particular paragraph No.27 thereof which reads thus :

"27. The decisions of this Court, therefore, leave no manner of doubt that a plaintiff in a suit for specific performance of contract not only must raise a plea that he had all along been and even on the date of filing of suit was ready and willing to perform his part of contract, but also prove the same.

> Only in certain exceptional situation where although in letter and spirit, the exact words had not been used but readiness and willingness can be culled out from reading all the averments made by the Plaintiff as a whole coupled with the materials brought on record at the trial of the suit, to the said effect, the statutory requirement of Section 16(c) of the Specific Relief Act may be held to have been complied with."

The Apex Court considered the requirement of Section 16 (c) of the Specific Relief Act, 1963 in another Judgment reported in (1999) 6 S.C.C. page No.337 (Syed Dastagir Vs. T.R.Gopalakrishna Setty). Paragraph Nos.12 and 13 thereof are relevant, which read thus :

> "12. In interpreting a pleading wherever there be two possible interpretations, then the one which defeats justice should be rejected and the one which subserves to justice should be accepted.
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> 13. It was held in the case of R.C.Chandiok V. Chuni Lal Sabharwal that readiness and willingness cannot be treated as a strait-jacket formula. This has to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned. Finally, we have no hesitation to hold that the pleading as made by the plaintiff not only shows his readiness and willingness to perform his part of the obligation under the contract but by tendering the total amount shows he has performed his part of the obligation. We also construe such a plea to be a plea of 'readiness and willingness' as required under Section 16(c). In view of the aforesaid findings we hold that the High Court committed an error by defeating the claim of the plaintiff on the basis of a wrong interpretation of his plea in terms of the said section."

The Apex Court no doubt was dealing with a slightly different

issue. However, after considering the requirement of Section 16 (c), the Apex Court held that in interpreting the pleadings wherever there were two possible interpretations, the one which defeats justice should be rejected and the one which subserves to justice should be accepted.

9. The view which is consistently taken by the Apex Court seems to be that the compliance with the requirement 'readiness and willingness' has to be in spirit and substance and not in letter and form. If the finding which is recorded by the District Court is perused it is very clear that five-sixth of the agreed consideration was paid by the Appellant to the Respondent. The Apex court in the case of Motilal Jain (supra) has held that when the Plaintiff in a suit for specific performance has established that he has parted with two-third of the consideration at the time of execution, there was no reason that he would not pay balance one-third consideration. It is true that the Apex Court came to the said conclusion in the facts of the case before it. It is to be noted here that what is required to be seen whether the Appellant has established his readiness and willingness. In the facts of this case, the Appellant had paid one-third of the consideration even before the execution of the suit agreement. Further 50% of the consideration was paid at the time of the execution of the agreement. When the Respondent disputed of having received a further sum of Rs.300/-, a pursis was filed by the Appellant in the Trial

Court offering to pay a sum of Rs.500/-. The said pursis was filed recording that the Appellant was willing to pay Rs.500/- to the Respondent. Even in the suit notice dated 5th January 1977 the appellant offered to pay balance consideration to the Respondent at the time of execution of the sale deed as per the stipulation contained in the suit agreement.

10. In my view, even on the basis of the facts which are held as established by the Appellate Court it is obvious that the Appellant established his readiness and willingness as admittedly five sixth of the agreed consideration was paid by him on the date of execution of the suit Agreement. The Appellant was ready and willing to perform his part of suit agreement in its true letter and spirit. The finding recorded by the trial Court on the issue of readiness and willingness could not have been disturbed by the Appellate Court. In the result Appeal must succeed.

11. The decree passed by the trial Court does not provide for direction to the Defendant to obtain sale permission from the Competent Authority. Though the appellant herein did not challenge the said decree, with a view to make the decree effective and meaningful, a direction will have to be incorporated in the decree for compelling the Defendant to obtain sale permission. The Appellate Court can always take recourse to the provisions of Rule 33 of Order XLI of Code of

Civil Procedure,1908 for passing appropriate decree which ought to have been passed.

12. Hence I pass the following order :

i) The impugned Judgment and Decree of the Appellate Court is quashed and set aside.

ii) The suit filed by the Appellant stands decreed in following terms :

a) The Appellant is directed to deposit the balance consideration of Rs.500/- in the Trial Court (if not deposited till today) within a period of four months from today.

b) On deposit of the said amount, the Respondent is directed to apply for sale permission to the competent Authority for sale of the suit property in favour of the Appellant. Such application shall be made by the Respondent within a period of four weeks from the date on which he is intimated by the Appellant about the deposit of a sum of Rs.500/- in the trial Court.

c) The Respondent shall execute the sale deed in terms of the suit agreement in favour of the Appellant within a period of four weeks from the date of obtaining sale permission.

d) In the event the Respondent fails to apply for sale permission within the stipulated period or in the event the Respondent fails to execute the sale deed within stipulated period, it will be open for the Appellant to get the decree executed by appointing of Court Commissioner in execution proceeding. The Court Commissioner, if necessary, will apply for sale permission on behalf of the Appellant and after the permission is obtained, shall execute the sale deed in favour of the Appellant.

e) In the event the application for grant of sale permission is finally rejected, the Appellant will not be entitled to a decree for specific performance and in such an event the Appellant will be entitled to a decree for a sum of Rs.2500/- from the Respondent with proportionate costs.

iii) Second Appeal is allowed in above terms. The Respondent will pay proportionate costs through out to the Appellant.

iv) Certified copy is expedited.

v) Parties to act upon an authenticated copy of this order.

Judge.